In the

Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI
TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NOTES TO REFERENCES

Most of the record references contained in this petition relate to the two appendices originally filed in the Court of Appeals. Nine additional copies of those appendices are filed in this Court with this petition.[1] The reference, PA, relates to the petitioners' (appellees') appendix originally filed in the Court of Appeals and the reference, GA, relates to the Government's (appellant's) appendix originally filed in the Court of Appeals.

The designation, A, refers to the appendix annexed to this petition.

The reference, GB, refers to the Government's Brief filed in the Court of Appeals and the reference, GRB, refers to the Government's Reply Brief filed in the Court of Appeals, both of which have been certified to this Court by the Clerk of the Court of Appeals upon petitioners' request.

The designation, TR, relates to the transcript of the trial in the district court.

The designation, R, relates to the certified copy of the record prepared by the Clerk of the Court of Appeals and on file in this Court.

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[1] One original, certified copy of the record appendices and proceedings in the Court of Appeals to and including November 8, 1960, is on file in this Court. However, since that volume's pagination differs from the original pagination as submitted by the parties, the petitioners herein refer to the page numbers which correspond exactly to the original appendices in the Court of Appeals, copies of which are available to each Justice.

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In the

Supreme Court of the United States

TERM

No.

DONALD K. SCHULTZ, *a minor, et al.*
Petitioners

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

In a Federal Tort Claims Act case, petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals vacating the judgment of the district court for the petitioners and remanding the case to that court for entry of judgment for the respondent.

The effect of the judgment of the Court of Appeals not only reverses the district court's judgment of $50,097.80,[2] with costs awarded to petitioners, but enters judgment for the Government against petitioner Carl W. Schultz in the sum of $912.00 for medical services rendered by the respondent to petitioner Donald K. Schultz, who is crippled and deformed as a result of injuries received on a government reservation.

OPINIONS BELOW

The opinion of the district court for the District of Maine, entered on June 24, 1959, finding for petitioners on the issue of liability appears in the Government's appendix to the Court of Appeals (GA. 16) reported in 174 F. Supp. 488 (1959).

The opinion and judgment of the district court, entered on August 25, 1959, awarding damages to the petitioners appears in the petitioners' appendix to the Court of Appeals, (PA. 7) reported in 176 F. Supp. 405 (1959).

The opinion and judgment of the Court of Appeals, vacating the judgment of the district court, appear in the Appendix to this Petition, *infra*, (A. 3) and unreported at this time.

JURISDICTION

The judgment of the Court of Appeals was entered on October 6, 1960, (A. 11). The jurisdiction of this court is invoked under 28 U.S.C.A. § 1254.

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[2] Actually the district court awarded petitioners the sum of $65,097.80, but the parties stipulated that the Government was entitled to a set off of $15,000 received by the minor petitioner in settlement of a companion case brought by the petitioners against Captain Jesse S. McAfee, Civil No. 1004, on the docket of the district court.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in applying the "scope of authority" limitation to the scope of employment test of the Federal Tort Claims Act, which limitation this Court expressly repudiated in *Hatahley* vs. *United States*, 351 U.S. 173, (1956)?

2. Did the Court of Appeals, in reversing the judgment of the district court, err in refusing to adopt or apply the principles of law established by the Seventh Circuit in *Stewart* vs. *United States*, 186 F.2d 627 (1951), *cert. den.* 341 U.S. 940, and the district court in *Beasley* vs. *United States*, 81 F. Supp. 518 (D.C 1948), which cases are "on all fours" with the instant case?

3. Did the Court of Appeals err in overruling the district court's findings on the issues of agency and scope of employment notwithstanding:

A) The provisions of the Tort Claims Act which defines "employees" of the Government as members of the naval forces, 28 U.S.C.A. § 2671, and it was undisputed that all the acts and omissions claimed to be negligent by the petitioners herein were naval personnel;

B) The provisions of the Tort Claims Act which defines "scope of employment" as "acting in line of duty," 28 U.S.C.A § 2671, and it was undisputed that the naval and marine officers and guards were on duty at the time the district court found they had breached their duty to act to protect the minor petitioner?

4. Whether the Court of Appeals' ruling that the minor petitioner was a trespasser or a mere licensee rather than an invitee to whom the duty of due care was owed is in direct conflict with the applicable law of Maine as interpreted by that state's highest court and its local district court?

5. Did the Court of Appeals err in holding that "Captain Ferriter was not an agent of the Government, in other words, t

was beyond the scope of his authority to bind the government notwithstanding that the agency and scope of employment issues, although contested in the district court, were not raised either in the Statement of Point on Appeal in the Court of Appeals or in the main briefs of both parties but mentioned for the first time in the Government's Reply Brief, to which petitioners had no opportunity to answer?

6. Did the Court of Appeals err in vacating the district court's judgment and ordering judgment for the defendant rather than returning the case to the district court for a determination of whether the Government breached its duty to the minor petitioner as a licensee or trespasser and to permit the district court to rule on the alternative grounds of claimed negligence raised by the petitioners in that court?

STATEMENT OF THE CASE

This is an action against the United States of America under the Federal Tort Claims Act, 28 U.S.C.A. § 1346 (b) 2671-2680. (A. 13) to recover damages for personal injuries sustained by the minor petitioner, Donald Schultz, as the result of his being accidentally shot on a government reservation located within the State of Maine.[3]

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[3] This Act, with certain exceptions (Sec. 2680) which we are not concerned with in this case, waives the sovereign immunity of the United States and provides for money damages for injury caused by the negligent or wrongful acts or omissions of any government employee acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the injured party in accordance with the law where the act or omission occurred. Such liability is governed by the law of the state where the tortious conduct occurred. *Massachusetts Bonding & Insurance Company* vs. *United States*, 352 U.S. 128 (1956); *Williams* vs. *United States*, 350 U.S. 857 (1955).

At all material times herein and particularly from mid-1951 through April 29, 1953, the Portsmouth Naval Base, including Fort Foster, was a United States Government Naval Reservation located at Kittery, Maine, owned by and under the supervision and control of the respondent. (PA. 3, 15)

Fort Foster itself was a government reservation situated on Gerrish Island near the mouth of the Piscataqua River in Kittery, Maine, approximately five miles on public highways from the naval shipyard. Fort Foster was enclosed by an eight foot fence with barbed wire along the top, except on the sea-side, with two access gates which were locked at all times and posted with signs indicating that the property belonged to the respondent and that no trespassing was permitted.

Fort Foster was used by personnel at the Base for some naval operations, storage, picnics, swimming, camping and pistol practice. Keys to the Fort were possessed by the chief of police, the captain of the watch and other responsible personnel at the Base. During this period the Fort was regularly patrolled at two hour intervals by security guards who toured the Fort as part of their official duties. (PA. 29)

The entire internal and external security of the Base, including Fort Foster, was under the supervision and direction of the Administrative Department in a chain-of-command down from the Administrative Office to the chief of police to the captain of the watch to the security guards. The security guards were under express orders to apprehend trespassers, "to stop any dangerous activities that they may have found being engaged in and upon Fort Foster," to prohibit unauthorized rifles from being brought into the Fort and to generally police the area. (PA. 15, 19)

During 1951-1953, Captain (now Admiral) Charles A. Ferriter was the Administrative Officer who was directly responsible for the security of the Base, including Fort Foster, the di-

rection and supervision of naval patrol vehicles and the custody of small arms ammunition stored at the shipyard. He was in this capacity second in command (subject only to the orders of the Base Commander) and in charge of all administrative matters on the Base. The chief of police was Edward Maby who exercised direct supervision over approximately 120 security guards, including Security Guard Roginski. Captain Jesse S McAfee was Supply Officer at the Shipyard. (GA. 17, 18)

Both Captain Ferriter and Captain McAfee occupied quarters at the Base with their families. Captain Ferriter's family included two sons, John, who was 16 years old on the date of the accident, and Nicholas, who was 11 years old on the date of the accident. Captain McAfee's family included his wife and son Robert who was 14 years of age on the date of the accident. (GA 18, 19)

During the years 1951, 1952, and 1953, the security guards during the course of their regular patrols had on numerous occasions transported the Ferriter boys, the McAfee boy and other minors to Fort Foster to swim, camp overnight, hunt, target-practice and generally play on the reservation. Permission and authority for the transportation and entrance into Fort Foster, with and without firearms, was by express orders of Captain Ferriter down through his chain of command to Chief Maby to the captain of the watch to the security guards. This permission and order was "complete" to the extent that Mrs. Ferriter's or the Ferriter boys' request to enter the Fort was to be honored by the security personnel. (PA. 16, 17, 21, 23, 31, 44)

No adult supervision was provided or present when the boys were using firearms at the Fort although the security guards on their regular patrol would at times "check in" on the boys. The boys' activities were "common knowledge" on the Base, officially recorded in naval logs and specifically known to Captain Ferriter, Captain McAfee, Chief Maby, Security Guard Roginski, captains of the watch and the security guards who transported the boys and "looked in" on them. At no time did any of the govern-

ment personnel stop or supervise the shooting activities of these youngsters. (PA. 25, 27, 36, 41, 52 and GB, 11)

On their trips to Fort Foster prior to April 28, 1953, the Ferriter boys and the McAfee boy shot their guns in a reckless and careless manner and their activities with firearms were summarized by young McAfee as follows: "It seems to me that we got more careless every time we went out there." (PA. 50, 51, 52)

The minor petitioner went to Fort Foster for the first time on April 28, 1953, and had no knowledge of the prior dangerous activities of the Ferriter and McAfee boys. (PA. 40, 58)

On April 27, 1953, the minor petitioner who was then 15 years old and the son of civilian residents of Portsmouth, New Hampshire, was an invited guest of the McAfee family at the McAfee's quarters on the Base. During the course of that day and at a Base dance which they attended that evening, the boys met the Ferriter boys and one Peter Schiott, who was also 15 years old and the son of civilian residents of Portsmouth, New Hampshire, and together they planned an over-night camping and hunting trip to Fort Foster for the evening of April 28th.

Captain Ferriter and Captain McAfee were informed that the boys were going to Fort Foster, (PA. 17, 26, 56) and the Government stipulated at trial that the minor petitioner was at Fort Foster "at the personal invitation and as a guest, of the Ferriter and McAfee families." (PA. 3)

The minor petitioner spent the night at the McAfee home and on the morning of April 28, Mrs. McAfee, with her son and Donald Schultz, drove into Portsmouth, where the boys picked up the minor petitioner's camping equipment and one gun at his home and then stopped for young Schiott, with his equipment and a gun at his home. Upon their return to the Base, the equipment and guns were stacked in plain view, beneath the kitchen window of the McAfee home. At lunch with Mrs. McAfee and Captain

McAfee the boys talked about the trip. Shortly after lunch the security patrol vehicle, driven by Security Guard Roginski, arrived at the McAfee residence with the two Ferriter boys. Inside the vehicle, stacked in plain view were three rifles belonging to the Ferriters. The remaining equipment and guns were loaded into the vehicle. The boys were driven by Security Guard Roginski to Fort Foster, where the boys, their equipment and guns were unloaded at the chosen camp site. (PA. 38, 57, 58, 59, 62)

When the patrol car passed through the main gate of the Base the Marine guards on duty checked the boys' passes but did not question them about the guns. (PA. 40)

No effort was made to conceal the guns and it is undisputed that Security Guard Roginski and the Marine guards knew of their presence. (GA. 21). The respondent conceded that one of the firearms, the gun that was used in the shooting of the minor petitioner, was an unauthorized firearm under applicable regulations of the Base. (PA. 63) At no time were any of the guns taken from the boys in direct violation of express rules and regulations of the Base. (PA. 3).

At the camp site, Jack Ferriter handed out approximately 100 rounds of ammunition to each boy except young McAfee who had brought his own ammunition, and the boys spent the afternoon hunting and shooting in pairs throughout the Fort. On one occasion the regular security patrol "checked in" on the boys but did not take the guns from the boys. (PA. 62) But the guards told the boys "to be careful." (PA. 66)

On April 29th the boys arose early and spent the morning hunting and shooting. At approximately 10:30 o'clock a.m. the boys broke camp and stacked their equipment beside the road to await the arrival of the next patrol for their return to the Base.

While waiting for the patrol, the minor petitioner and young Schiott were wrestling on the top of a small hill nearby. Young

McAfee saw Schiott's gun lying on the ground with several unexpended shells in the magazine, which he decided to shoot. He threw a cigarette paper into the air, took aim and fired. The bullet struck the minor petitioner in the back causing painful injuries which required a number of emergency operations to save his life, and he is now permanently crippled and deformed. (PA 7)

The petitioner brought this action for the personal injuries, pain and suffering and loss of earnings and earning capacity sustained by Donald, and for medical and hospital expenses and loss of services sustained by his father, Carl W. Schultz, as a result of the shooting.

Respondent counter-claimed for the cost of hospital care furnished to the minor petitioner at the United States Naval Hospital, Portsmouth, New Hampshire, from the date of the accident to July 2, 1953, in the stipulated amount of $912.00.

Upon motion of the respondent, the district court ordered separate trials on the issues of liability and on the issues of damages. (GA. 17)

The trial on liability consumed five full days of trial, March 24, 25, 26, 27 and 30, 1959, and almost 800 pages of trial testimony were recorded. Many witnesses from four different states appeared to testify, most of whom were government agents and employees.

With every iota of evidence that could be put before him concerning the circumstances of the accident, Judge GIGNOUX, in a lengthy and carefully considered opinion, on June 24, 1959, found:

> "From the foregoing summary of the evidence, it is clear that the Government personnel in charge of and responsible for security at the Portsmouth Naval Base and Fort Foster, knew, or certainly should have known, that for a period of approximately two years prior to this accident 14- and 15

year old boys frequently had been hunting and shooting at Fort Foster without adult supervision. This record compels the conclusion that certainly Captain Ferriter, Chief Maby, Security Guard Roginski and various other members of the security force were cognizant of this activity. In the opinion of this Court, any responsible official, including those here involved, should have realized that the indiscriminate use of firearms by young boys, without adult supervision, was dangerous and that an accidental shooting might be anticipated. See *Bucholz* vs. *City of Sioux Falls*, __ SD. __, 91 N.W.2d 606, 612 (1958). And yet the record is barren of evidence that any of these officials in their official capacities made any effort to supervise or stop this dangerous practice. Having permitted the practice to continue, they must be held responsible for the effects which they should have foreseen. See *Stewart* vs. *United States*, 186 F.2d 627, 632-634 (7th Cir. 1951); *Beasley* vs. *United States*, 81 F. Supp. 518, 524, 525 (Ed. S.C. 1948); *Hersum* vs. *Kennebec Water District*, 151 Me. 256, 265-267 (1955); *Hutchins* vs. *Emery*, 134 Me. 205, 207-208 (1936); *Hatch* vs. *Globe Laundry Co.*, 132 Me. 379, 382 (1934). As Government employees charged with responsibility for the security of Fort Foster, they had the duty to act, apart from the status which any of them may have had as parents, a duty which was imposed upon them within the scope of their office or employment. And the failure of these officials to act in their official capacity is chargeable to defendant by the express provisions of the *Federal Tort Claims Act*, 28 U.S.C.A. § 1346 (b), *supra*. *Beasley* vs. *United States*, *supra*, 524. In view of all of the foregoing, the Court is compelled to the conclusion that the minor plaintiff's injuries were directly attributable to the negligent failure of responsible Government employees in their official capacities to supervise or stop the dangerous practice which has been described, and that the defendant is responsible therefor." (GA. 23, 24)

With respect to the status of the minor petitioner while at Fort Foster, the Government's position at trial was that although he was an invited guest at the Fort, he should be considered by the Court as a trespasser or at most a bare licensee. On this issue, the Court made the following findings:

> "The evidence establishes that during the period involved the Fort Foster facilities were utilized frequently for similar excursions by minor dependents of Naval personnel in addition to the McAfee and Ferriter boys. All of them went there with the acquiescence of authorized Naval personnel. Of this particular excursion, Admiral Ferriter specifically testified that he knew of and acquiesced in the presence of both the minor plaintiff and the Schiott boy. Further, the boys were issued official passes, transported to the Fort by an official Navy vehicle, and were left, with their equipment, at their camping site at the Fort. Finally, on the evening of April 28, at least one patrol looked in on the boys at the camp site, and the regular patrols to and from the Fort passed near the area in which the boys were camped at regular intervals during the campout." (GA 24, 25)

On the basis of these detailed and carefully considered findings, Judge GIGNOUX concluded that the Government's contention was "without merit".

> "The minor plaintiff and young Schiott were on the Base, as others had been on the Base on many previous occasions, as the invited guests of the dependent children of Naval personnel stationed thereon, and they were there with the full knowledge and acquiescence of the responsible officials. Certainly Captain Ferriter and those responsible for security at the Base were familiar with the fact that personnel quartered on the Base had minor dependent children and that these children had minor friends and visitors from neighboring communities. In no sense could they be called trespassers. Such visitors, including the minor plaintiff and

young Schjott, were on the Base with the implied and perhaps express consent of the Government. Such being the case, the Government and its officials owed them the duty to exercise reasonable care for their safety. See *Beasley* vs. *United States, supra*, 526; *Searles* vs. *Ross*, 134 Me. 77, 81 (1935); *Brown* vs. *Rhoades*, 126 Me. 186, 188 (1927); *Stewart* vs. *United States, supra*, 633; *cf. Peets vs. United States*, 165 F. Supp. 177, 180 (S.D. Cal. 1958); *Claypool* vs. *United States*, 98 F. Supp. 702, 706 (S.D. Cal. 1951) (GA. 24, 25)

In consonance with these conclusions, Judge Gignoux ordered judgment for the petitioners, with costs, in amounts to be determined at a hearing upon the issues of damages. (GA. 26)

Judge Gignoux specifically did not rule on petitioners' remaining allegations of negligence because of the aforesaid ruling on their first point of negligence. (GA. 23)

The trial on the issues of damages consumed three full days of testimony, August 17, 18 and 19, 1959. The court gave consideration "to the severe nature of the injuries, to the long and protracted period of pain and suffering, to the impairment of physical activity, to the permanent disability and to the deformity sustained," and on August 25, 1959, awarded the petitioners the sum of $50,097.80 and entered judgment upon the Government's counter-claim for medical services rendered to the minor petitioner in the amount of $912.00, without costs. (PA. 7)

On appeal, the Government claimed that the district court erred in its holding that the Government owed the minor petitioner the duty of due care and in its ruling on the issue of proximate cause. (A. 12).

At no time in the Government's Statement of Points on Appeal or in its main brief did it raise the scope of employment or agency

issue.[4] The first mention of these issues is found in its reply brief, the propriety of which is discussed, *infra* at 23.

Some seven months after oral argument before the Court of Appeals, that court reversed and ordered judgment for the respondent on October 6, 1960. (A. 11)

The Court of Appeals, without citation of law, found that "Captain Ferriter was not an agent of the Government, in other words, it was beyond the scope of his authority to bind the Government with responsibility therefore. . . ." (A. 10) The court also held that the minor petitioner was not owed the duty of due care although "he was at the Fort with the knowledge and acquiescence of responsible government officials. Of that there can be no doubt. And we may assume, although we do not need to decide, that their knowledge and acquiescence was that of the United States." (A. 7)

Conceding the claim "that responsible officials at the Portsmouth Navy Yard were derelict in their duty either in not preventing the boys from using firearms at the Fort at all, or in not providing adult supervision over their shooting" (A. 9) and further conceding that "a tenuous mutuality of interest might be found with respect to the minor plaintiff's visit to Captain McAfee's quarters in the Navy Yard," (A. 8), the Court of Appeals yet concluded that the minor petitioner was barred from recovery.

In terms of concrete factual analysis the Court of Appeals not only overruled the district court's findings of fact and law as to the status of the minor petitioner while on the Base and Captain Ferriter's and McAfee's relationship to the government, but in

[4] The Statement of Points on Appeal and the parties briefs filed in the Court of Appeals are, of course, the best evidence of petitioners' claim on this point and, therefore, the petitioners requested that these documents receive separate certification by the Clerk of the Court of Appeals and are made a part of the record before this court.

effect sanctioned and condoned the gross and horrifying disregard of rules, regulations, orders and duties by the security and Marine officers and guards while acting in the line of duty:

a) The Government stipulated at trial that the gun that shot the minor petitioner was "unauthorized and admitted on the Base contrary to rules and regulations," which even the Court of Appeals concedes the Marine guard "*on duty* . . . asked no questions about the guns which he must have seen for they were in plain sight." (emphasis added) (A. 5)

b) It was undisputed that Chief Maby, Security Guard Roginski and other guards while on duty failed to stop the shooting activities of these boys although they were under an "absolute" duty to stop any "indiscriminate shooting at the Fort." (PA. 19, 20, 33)

c) It was undisputed that Marine sentries while on duty failed to confiscate all unauthorized guns and to see to it that none were transported in naval vehicles. (PA. 19, 33, 42)

d) It was undisputed that naval personnel violated the rule that privately owned firearms must be kept under lock and key in their residences. (PA. 15)

e) It was undisputed that naval personnel violated the rule that possession and use of privately owned firearms or ammunition required written permission of the Administrative Office was ignored. (PA. 19, 63)

The petitioners respectfully submit that a judgment for the petitioners under the facts and circumstances on this case coupled with the Government's own admission to the trial court that "on the trips to Camp Foster, some of which were overnight, the boys were apparently turned loose, rifles and all, without further ado . . ."[5] will not invite an "early advent of the welfare state" as the

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[5] Government's trial brief submitted to Judge GIGNOUX, p. 3.

Government alleged to the Court of Appeals (GB. 12) but rather will insure that the intent of Congress in passing the Federal Tort Claims Act is preserved and strengthened, as succinctly and admirably stated by this Court:

> "Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the government and the resulting burden on each taxpayer is relatively light. But when the entire burden falls on the injured party it may leave him destitute or greviously harmed."
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> *Rayonier, Inc.* vs. *United States*, 352 U.S. 315 at 320 (1957).

REASONS FOR GRANTING THE WRIT

I. THE IMPOSITION BY THE COURT OF APPEALS OF THE "SCOPE OF AUTHORITY" LIMITATION IN A TORT CLAIMS ACT CASE IS IN DIRECT CONFLICT WITH DIMENSIONS OF THIS COURT EXPRESSLY REJECTING SUCH LIMITATION AND RAISES SERIOUS QUESTIONS CONCERNING THE INTENTION, CONSTRUCTION AND APPLICATION OF THE ACT.

The Court of Appeals, despite the Government's acknowledgment that "a qualified agent of the Government directly communicated an invitation to him (minor petitioner)" (GB. 6), ruled that "Captain Ferriter was not an agent of the Government, in other words, it was beyond the scope of his authority to bind the Government." (A. 10) The importance of this ruling is immediately apparent when applied to the facts of this case and poses in its starkest form a definite limitation upon the test of scope of employment which this court devoted such extended attention to in *Hatahley* vs. *United States*, 351 U.S. 173 (1956), and *Philadelphia & Reading R. R. Co.* vs. *Derby*, 55 U.S. 291 (1852).

An analysis of the decision of the Court of Appeals reveals that the court recognized the minor petitioner was expressly invited to

Fort Foster (and as an invitee, he would be entitled to the duty of reasonable care by the respondent), but the invitation was extended by those acting beyond their authority and, therefore, he must be considered a trespasser or licensee.

Assuming, *arguendo*, at this point in the petition, that the petitioners only hook of liability in the district court hinged on the issue of Captain Ferriter's scope of employment,[6] we respectfully submit the Court of Appeals' decision was premised on a manifestly incorrect application of the facts and the law.

Captain Ferriter was a "line" officer, second in command of the entire Base. He had power to amend and suspend rules and regulations. (Tr. *222*) He had the direct responsibility of control and supervision of the personnel, premises, equipment and instrumentalities which form the very basis of liability in this case Fort Foster, guns, security guards, transportation in naval vehicles, and the internal security and protection of Fort Foster. (GA. 17) As aptly put in naval lingo by counsel for the Government in the lower court, Captain Ferriter "draws a lot of water." (Tr. 190)

By statute, Captain Ferriter was an employee of the Government. Under the Tort Claims Act, an employee of the Government includes "members of the military or naval forces." 28 U.S.C.A. § 2671.

In addition, the record is barren of any rule, regulation, statute or even custom which places Captain Ferriter's actions beyond the scope of his employment or realm of his power and authority

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[6] The major thrust of petitioners' case in the trial court was that *numerous* agents and employees were negligent while on duty, including the security guards, Marine guards, and Chief Maby, as well as Captain Ferriter, and the district court so interpreted petitioners' position. (GA. 22, 23) However, the Court of Appeals considered only the issue of Captain Ferriter's scope of authority which petitioners respectfully submit was error. See *infra* 23.

Notwithstanding this formidable evidence, the Court of Appeals held that the Captain was not an agent of the Government. In doing so, it applied the "scope of authority" test to the scope of employment provisions of the Tort Claims Act. This Court expressly repudiated this limited test in the *Hatahley* case, *supra*, at 181:

> "There is an area, albeit a narrow one, in which a government agent, like a private agent, can act beyond his actual authority and yet within the scope of this employment."

As a matter of law, this Court rejected the government's claim that if its employees' actions were unauthorized then, *a fortiori*, he must have been acting outside the scope of his employment. This Court stressed that § 1346 (b) of the Act includes "wrongful" conduct of employees as well as negligence. 351 U.S.

In *Harmon* vs. *Brucker*, 355 U.S. 579, at 581, this Court stated:

> "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers."

In the early case of *Philadelphia & Reading R. R. Co.* vs. *Derby*, 55 U. S. 291 at 294 (1852), this Court stated that the master is responsible for the wrongful acts of its employee, whether said act was one of omission or commission:

> "If it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize or even know of the servant's act or neglect, or even if he disapproved or forebade it, he is equally liable, if the act be done in the course of his servant's employment."

The law of Maine, recognizes these established legal principles. In *Eaton* vs. *Lancaster*, 79 Me. at 477 and in *Mitchell* vs. *B. Ifrade Shoe Co.*, 152 Me. 100, at 103 (1956), the courts state:

> "If the orders or directions of an employer have been violated by an employee, the one to suffer is not the innocent

> person, not a party to that relationship. Were it otherwise, employers could easily absolve themselves of responsibility and injured parties would be left without any redress."

See, also, *United States* vs. *Stewart*, 201 F.2d 135 (1953), wherein the court held that a government inspector was acting within the scope of his employment when he shot his gun to frighten away some dogs whose barking disturbed him and the bullet ricocheted and struck the plaintiff.

Even if Captain Ferriter exceeded his actual authority in this case, the Government would still be responsible for his actions because it clothed him with the ostensible authority to do what he permitted to be done. This principle of law is firmly established and recognized by the Maine courts. See, *Stevens* vs. *Frost*, 140 Me. 1, 7 (1943). If an employee does something similar to what he is authorized by his employer to do but beyond his actual authority, the employee is still acting within the scope of his employment for which the employer is held responsible. *Restatement, Agency* 2d, § 229, *et seq.*

We respectfully submit that certiorari should be granted because the Court of Appeals imposed a direct limitation on the agency and scope of employment provisions of the Tort Claims Act, contrary to the express pronouncements of this Court.[7]

2. THE DECISION OF THE COURT OF APPEALS IS DIRECTLY IN CONFLICT WITH THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS IN *Stewart* VS. *United States*, 186 F. 2d 627 (1951); *Cert. den.*, 341 U.S. 940 AND *Beasley* VS. *United States*, 81 F. Supp. 518 (Ed. S.C. 1948), AND RAISES IMPORTANT QUESTIONS CONCERNING THE CONSTRUCTION AND APPLICATION OF THE TORT CLAIMS ACT.

The district court in the present case cited and applied the principles of the Tort Claims Act as set forth in the *Stewart* and

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[7] Frankfurter and Hart, 48 *Harv. L. Rev.* 238, 272

Beasley cases, *supra*. These cases are "on all fours" with the instant case.

In the *Beasley* case, minor dependents of military personnel with their friends and guests, also minors, on a federal reservation were attempting to fire projectiles from a toy cannon with the use of gun powder. Several military officials observed the boys as they passed where the youths were playing. One of the boys was injured when the gun powder exploded. The court held that it was actionable negligence on the part of the government if its personnel knew that the boys were on the premises, with their guests and visitors, using a dangerous appliance or weapon, and these officials or certainly some of them, with this knowledge in mind, made no effort to supervise or correct these excesses or dangerous acts. (81 F. Supp., at 523-524.) In the instant case, Judge GIGNOUX, adopting almost the exact language of the *Beasley* case, found that "the record is barren of evidence that any of these officials in their official capacities made any effort to supervise or stop this dangerous practice." (GA. 23) At page 530, the *Beasley* court stated:

> "And in the face of this knowledge they did nothing to prevent these activities and allowed them to go on thus causing or acquiescing in a train of circumstances which culminated in the fatal explosion whereby the plaintiff was seriously injured, and so it may well be said that the explosion and the resulting damage were caused by the negligence, both active and passive, both in acts of commission and of omission by the officers in charge of and responsible for the safety of the premises that they had in charge."

In the *Stewart* case, the court conceded that under local law the minor boys who were injured by an explosive from a federal reservation might be classified as trespassers to whom no duty of reasonable care was owed. The court, however, stated that since the boys had been on the federal reservation on previous occa-

sions "with the implied and perhaps express consent of the government" (the exact language used by Judge Gignoux and concurred in by the Court of Appeals) the Government was responsible because it "could reasonably anticipate that they might do as they did." (Judge Gignoux found that the Government should have realized that the boy's activities were "dangerous and that an accidental shooting might be anticipated.") (GA 23)

Thus, it appears clearly that there is a direct conflict among the Circuits as to the scope of the Government's responsibility under the circumstances of these cases.

And, in petitioners' view, the instant case for certiorari is far more impelling. Here, aside from Captain Ferriter, the district court found that government agents while on duty failed in their express duty to act, "*a duty which was imposed upon them to act in the scope of their office or employment.*" (emphasis added) (GA 24) Clearly this brings the petitioners' case within the "wrongful act or omission" provision of the Tort Claims Act.

With respect to the scope of employment issue, the provisions of the Tort Claims Act, Section 2671, 18 U.S.C.A., defines scope of employment as "acting in line of duty," and it is undisputed that the security guards and Marine guards were acting in the line of duty at the time the district court found they had breached their duty to act to protect the minor petitioner.

The evidence overwhelmingly supported Judge Gignoux's finding that the government agents failed in their duty to act to stop or supervise the dangerous activities of the boys and "must be held responsible for the effects which they should have foreseen." (GA 23)

Even the Court of Appeals concedes that the Marine guard was "on duty" (A. 5) when he observed the guns which were not taken away from the boys contrary to the express rules and regulations of the Base.

Although it is common knowledge that a loaded rifle is a dangerous instrumentality, that the promiscuous and indiscriminate use of firearms by young boys is a dangerous activity, and that youngsters shooting, hunting and target practicing should be supervised, *Bucholz vs. City of Sioux Falls*, S.D. 91 N.W.2d 600, 612 (1958), there was no need for the court to take judicial notice of these facts in the present case because the employees of the government expressly admitted it:

> Mr. MILLS. Q. Well, that's what I want to know. That is, picking up boys with guns without an adult supervisor and taking them to Camp Foster would be considered by you to be unreasonable, is that right?
>
> Admiral FERRITER. A. That's true. (PA. 25)

> Mr. BLANK. Q. All right, sir. Now, I ask you if in the chain of command down from you in the police department took your boys and transported them in a Navy vehicle to Fort Foster with their guns and without an adult with them, that was unreasonable?
>
> Admiral FERRITER. A. I concur. Yes.
>
> Q. And dangerous? A. Yes. (PA. 29)

That the boys of naval personnel are no exception to the proposition that youngsters should not be permitted to use firearms indiscriminately was vividly revealed to the court by the shocking revelations of their shooting activities at Fort Foster.

Bob McAfee shot a coca-cola bottle out of Jack Ferriter's hand. (PA. 48)

Jack Ferriter tried to bang in the door of the observation tower by using the butt of a loaded rifle which went off and the bullet narrowly missed him. (PA. 50)

Bob McAfee and Jack Ferriter shot at occupied lobster boats. (PA. 51, 52).

These youngsters shot all over the Fort where "there were people going in and out." (PA. 49)

They shot at everything that presented itself as a target. (PA 49)

Bob McAfee testified: ". . . it seems to me that we got more careless every time we went out there . . ." and that the "whole thing" culminated in the shooting of Donald Schultz. (PA. 52)

The official naval logs stand as immutable evidence that the defendant was on official, recorded notice of the boys' activities (PA. 25, 31) These logs recorded "from time to time" and on "quite a few occasions" during the years 1951-1953 that the boys were at Fort Foster with firearms. (PA. 30, 31) Admiral Ferriter read these logs "practically daily." (PA. 14, 25) Chief Maby called to the attention of Admiral Ferriter that the boys were using firearms and received specific orders to allow it (PA. 17, 30, 31, 32) The captains of the watch recorded the boys' activities at Fort Foster (PA. 33, 34), and the security guards not only drove the boys there but actually observed them at Fort Foster (PA. 46, 49) and even told them "to be careful" (PA. 46) Captain McAfee knew that firearms were being discharged by these boys at the Fort. (PA. 53, 54, 55), and the record is replete with statements that the guns were carried openly and visibly to and from Fort Foster. (PA. 36, 37, 38, 39, 67)

Petitioner submits that the decision of the Court of Appeals below is erroneous and the conflicting decisions of the *Beasley* and *Stewart* cases correct. This court should grant certiorari to review this case so as to eliminate these irreconcilable decisions in the lower federal courts and to preserve uniformity of decision among circuits in Federal Tort Claims Act cases.[9]

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[9] This case directly concerns the Government's obligations and responsibility to thousands of minor dependents presently living on military installations and their friends and visitors.

3. THE QUESTIONS PRESENTED ALSO ARE OF IMPORTANCE IN THE FIELD OF FEDERAL APPELLATE PROCEDURE BECAUSE THE COURT OF APPEALS ACTED BEYOND THE SCOPE OF ITS LIMITS OF REVIEW, WHICH ACTION WAS PREJUDICIAL TO THE RIGHTS OF PETITIONERS ON APPEAL.

Rule 24 of the rules for appellate procedure in the First Circuit prescribe that the appellant file a Statement of Points on Appeal. The purpose of such a rule is to point out to the appellate court the specific rulings or actions of the district court which are challenged as erroneous and limit presentation to those points. *Cohen* vs. *United States*, 142 F.2d 861 (1944).

As pointed out, *supra*, the agency and scope of employment issues were decisive in the Court of Appeals' reversal of the district court's decision. However, at no time in the Government's Statement of Points on Appeal or in its main brief did it claim that Captain Ferriter, Captain McAfee, Chief Maby, Security Guard Roginski, the Marine guards, or the guards that "checked in" on the boys while they were at Fort Foster, were not employees or agents of the government nor at all material times acting within the scope of their employment. On the issue of scope of employment, the very first mention of it on appeal was in the Government's Reply Brief, and that without citation of law or reference to the record. (GRB. 2) On the issue of employment or agency, at no time did the Government at trial or on appeal claim that the personnel at the Base, whom the district court charged with negligence and wrongful conduct, were not employees of the

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Petitioners further note the case of *Gloria Mosby* vs. *United States*, Civil No. 3960, (WD. Tenn. 1960), as yet unreported, wherein the district court awarded damages to the plaintiff for the negligence of government employees in permitting an unauthorized gun to be brought into a government hospital which was used by a patient to shoot the plaintiff.

government.[10] Not only in the pleadings filed in this case did the Government admit that Fort Foster was owned by and under the control of the Government "through its agents and servants United States Navy personnel, then and there acting within the scope of their employment and authority" (R. 11, 14), but, also, expressly stipulated at trial that Captain Ferriter, Captain McAfee and Security Guard Roginski were "at all times material hereto Government employees. . . ." (PA. 3)

The Court of Appeals, therefore, ruled on this vital question *de novo* without the benefit of petitioners' arguments of law and fact which they had presented in a lengthy trial brief to the district court.

In *Palmer* vs. *Reconstruction Finance Corporation*, 164 F.2d 466 (1947) *cert. den.* 334, U.S. 811, this exact issue was discussed and the court stated it "may not reverse" on a point "raised for the first time after the appellee has filed its brief, which it had no chance to answer." 164 F.2d 466, 468.

This Court in *Hormel* vs. *Helvering*, 312 U.S. 552, 557 (1940) admonished that only "where injustice might otherwise result" should an appellate court consider questions not properly raised in the ordinary course of appellate procedure. See, also, *United States* vs. *Spector*, 343 U.S. 169, 172 (1951).

There is abundance of authority for the proposition that the appellate court should not consider points raised for the first time in a reply brief:

O'Dell vs. *Young*, 190 S.W.2d 971 (1947).
Cantanzaro vs. *Dazer*, 329 S.W.2d 257 (1960).
Schwarb vs. *Schwarb*, 160 N.E.2d 329 (1960).
Denny vs. *Spot Martin, Inc.*, 328 S.W.2d 300 (1960).

[10] The Government's Statement of Points On Appeal is set forth in the appendix to this petition, A. 12, and the Government's briefs to the Court of Appeals have been certified to this court upon petitioners' request.

On appeal, the plain fact of the matter is that the petitioners had a substantial judgment in their favor set aside and judgment entered against them on a point that they neither could brief or argue with citations of law and fact. Thus, petitioners' case puts in sharpest focus an important phase of appellate practice and procedure which should be decided by this Court as a guide to Courts of Appeals and counsel in the future.

4. THE QUESTIONS INVOLVED HEREIN FURTHER MAKE A STRONG CASE FOR CERTIORARI BECAUSE THE DECISION OF THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH THE SETTLED LAW OF THE STATE COURTS OF MAINE AND THAT STATE'S LOCAL FEDERAL COURT

The district court found the Government's contention at trial that the minor petitioner was a trespasser or a bare licensee was "without merit." The Court of Appeals swept aside Judge GIGNOUX'S carefully considered reasoning on this point and sees the situation as no different than a "landowner" who "out of good nature . . . perhaps on his way home from town, gives a ride to boys or men knowing that they are on their way to his farm or woodlot to shoot for sport." (A. 9)

But the situation is different. Minor dependents and their friends are part and parcel of the business of any large naval base. In reality, they are an intricate part of the business of every military installation and their welfare, conduct and activities should be and *are* the concern of the government and its agents who are appointed by it to operate these reservations. As was stated by Captain McAfee

> "We were all living there within the narrow confines of the Shipyard and there was very little facilities for youngsters to amuse themselves with. Fort Foster was one of the few places *that was available to them* for recreational purposes." (PA. 56) (emphasis added)

There was no "good nature" influence on the part of the Government to make these facilities "available to them" but rather the "good business" of military life on a confined naval base demands that the minor dependents be accounted for, taken care of and protected. How the Court of Appeals could classify these important factors of military life and the morale of those living in it as a "tenuous" benefit to the government escapes the petitioners.

Under the law of Maine, which must be applied here, a person is an invitee if he is on the premises by invitation.[11] The Government never contested that the minor plaintiff was invited to the Base and at trial stipulated that he was so invited to Fort Foster nor can it contest the fact that the minor petitioner was there with the consent, knowledge and acquiescence of the Government.

The Court of Appeals cites the *Lewis* vs. *Maine* case which it claims "rules the case at bar." (A. 8) The petitioners respectfully submit that the Court of Appeals reliance on the *Lewis* case is misplaced because, aside from the vast factual differences, the Maine court expressly stated that the victim was not an invitee because the parties *"neither alleged nor contended that there was any direct invitation or permission given by the owner"* to her. 150 Me. at 77. (emphasis added) The court further classified an invitee under Maine law as one who is on the premises by express or implied invitation of the defendant. In the instant case, the petitioners *did* contend and the district court *found as a fact* that the minor petitioner was on the premises by direct invitation and permission and that he "in no sense" could be classified as a trespasser. (GA. 24, 25)

The law of Maine further recognized that if a person is induced or allured to another's premises, he may yet be considered an

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[11] *Shaw* vs. *Piel*, 139 Me. 57, 60 (1942); *Foley, Malloy* vs. *Farnham Co.*, 135 Me. 29, 34 (1936); *Searles* vs. *Ross*, 134 Me. 77, 81 (1935); *Brown* vs. *Rhoades*, 126 Me. 186, 188 (1927); *Kidder* vs. *Sadler*, 117 Me. 194, 196 (1918).

invitee although the landowner receives no benefit from his visit. *Beckwith* vs. *Somerset Theatres, Inc.*, 139 Me. 65, 69 (1942); *Bingham* vs. *Marcotte, Cote & Company*, 115 Me. 459 (1916).

The judgment of the Court of Appeals should be reviewed because it narrows almost to an illusion the invitee principles of law of the State of Maine contrary to the pronouncements of that state's highest court and contrary to the basic and sound interpretation of the facts and law as determined by that state's federal district court.

5. A FURTHER REASON WHY CERTIORARI SHOULD BE GRANTED IN THIS CASE IS, EVEN ASSUMING JUDGE GIGNOUX WAS IN ERROR IN HOLDING THAT THE MINOR PETITIONER WAS OWED THE DUTY OF DUE CARE, THE FACTS IN THIS CASE MIGHT WELL ADD UP TO "WANTON" DISREGARD OF MINOR PETITIONER'S RIGHTS WHICH WOULD ENTITLE HIM TO A RECOVERY EVEN IN THE STATUS OF A TRESPASSER OR LICENSEE. THE COURT OF APPEALS THEREFORE, SHOULD NOT HAVE ENTERED JUDGMENT AGAINST THE PETITIONERS BUT SENT THE CASE BACK FOR FURTHER PROCEEDINGS BY THE DISTRICT COURT, ON THE EVIDENCE.

The district court did not rule on petitioners' claims of "gross" disregard and total want of care on the part of the Government. Under Maine law, even if a person is a trespasser, a landowner owes him the duty not to wantonly injure him and "wantonness" has been defined to include not only intentional torts but also "gross" negligence and "total want of care" on the part of the defendant. *Blanchard* vs. *Bass*, 153 Me. 354 at 358 (1958).

As pointed out, petitioners claimed in the district court that agents of the government, aside from Captain Ferriter, were grossly negligent while on duty. The district court should be allowed to rule on these allegations raised by petitioners' claims of negligence, which might very well add up to "wantonness." Since the Court of Appeals set aside the district court's views

on which it entered judgment, the petitioners respectfully urge this Court to send the case back for rulings on petitioners' claims which the district court felt were "unnecessary" at the time because of its views on the invitee issue. (GA. 23)

Furthermore, the law is clear that when the presence of a licensee becomes known to a landowner, the latter owes him a duty not to subject him to danger, particularly when there is an activity on the property which may endanger his life and limb. We submit that even under the Court of Appeals' interpretation of the law of Maine, the respondent would owe the duty to the minor petitioner to avoid injuring him by a positive act of which is the equivalent of such act. *Restatement, 2 Torts*, Sec. 342. *Ward* vs. *Avery*, 113 Conn. 394, 396; *Patten* vs. *Bartlett*, 111 Me. 409 (1914).

The district court and petitioners should be given the opportunity to have these issues, heretofore not determined, resolved by remanding the case back to Judge GIGNOUX for further proceedings.

6. THE COURT OF APPEALS REVERSED THE DECISION OF THE DISTRICT COURT CONTRARY TO THE PRINCIPLES OF RULE 52 (a), F R Civ. P., 28 U.S.C.A., AND CASES THEREUNDER

Under the law of Maine, if more than one conclusion is justified, the issue is one for the trier. In *Mitchell, Inc.* vs. *Belgrade Shoe Co., supra*, the Maine court applied this principle of law and held that the scope of employment issue was one of fact for the court. See, also, *Good vs. Berrie*, 123 Me. 266 (1923) *Pearl* vs. *Cumberland Sand Gravel Co.*, 139 Me. 411 (1943). We submit that the invitee issue was also for the trier.

These issues required a balancing of the credibility, persuasiveness and weight of the evidence. They were fully and conscientiously tried by an experienced judge. The court as thoroughly cognizant of the factual issues involved and legal principles to be

applied. The written decision of the court demonstrates clearly that Judge GIGNOUX carefully considered the sufficiency and weight credibility of the witnesses and the local and federal law applicable to the facts as he found them.

On appeal, no questions were raised as to the admissibility of evidence nor was there any specific challenge to any ruling of the court.

We respectfully submit that the district court's findings were amply supported by substantial evidence and that the Court of Appeals erred in setting them aside. *United States* vs. *Yellow Cab Co.*, 338 U.S. 338, 341 (1941); *Graver Mfg. Co.* vs. *Linde Co.*, 339 U.S. 605 (1949); Rule 52 (a), FR Civ. P., 28 U.S.C.A.; *Mendez* vs. *Mendez*, 176 F.2d 849, 851 (1 Cir. 1949).

CONCLUSION

Prior to the accident the minor petitioner was, as Judge GIGNOUX found, "a normal, well developed, socially adjusted, athletically motivated boy of fifteen years." (GA. 12) As a result of the accident, he is a crippled, deformed boy who suffered such severe pain and mental distress that "there can be no question but that no amount of money can truly compensate this young man." (GA. 12) His case has been in the federal courts for over six years and, as the docket entries vividly illustrate, almost every conceivable procedural and pretrial motions were made by the parties.

Coupled with all the legal reasons advanced in this petition the terrific impact of the Court of Appeals' ruling upon this young man with an already "psychological reaction to his misfortune and the resulting embarrassment and anxieties which have made it difficult for him to resume a normal life" (GA. 12), urge this Court to grant certiorari to decide his case in the interests of justice and equity.

The petitioners respectfully pray that this petition for a writ of certiorari be granted.

Respectfully submitted.

WILLIAM A. BLANK
ROBERT C. ZAMPANO
PHILIP ISAACSON

APPENDIX TO PETITION

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5597

UNITED STATES OF AMERICA
Defendant, Appellant

vs.

DONALD K. SCHULTZ, ETC., ET AL
Plaintiffs, Appellees

Appeal from the United States District Court
for the District of Maine.

Before WOODBURY, *Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Peter Mills, United States Attorney, and Conrad K. Cyr, Assistant U. S. Attorney, with whom Ronald A. Jacks, Attorney, Department of Justice, was on brief, for appellant.

Robert C. Zampano, with whom William A. Blank and Philip M. Isaacson were on brief, for appellees.

OPINION OF THE COURT

October 6, 1960

WOODBURY, Chief Judge. This is an appeal by the United States from a judgment entered against it in an action under the Federal Tort Claims Act. Title 28 U.S.C.A. §§ 2671-2680. The plaintiffs are a father and his minor son who were civilian

residents of Portsmouth, New Hampshire. The son, who was fifteen years old at the time, was injured under the following circumstances while on government property annexed for administrative purposes to the Portsmouth Naval Shipyard in Kittery, Maine.

The minor plaintiff spent the night of April 27, 1953, in the quarters in the Shipyard provided by the Government for Captain McAfee, Supply Officer at the Yard, as the house guest of Captain McAfee's fourteen year old son, Robert. The boys with the two sons of Captain, subsequently Admiral Ferriter, Administrative Officer in charge of the security of the Yard, who were then sixteen and eleven years old, and a fifteen year old friend and house guest of theirs from Portsmouth, laid plans to camp out the following night at Fort Foster, an abandoned coast artillery post on Gerrish Island, Maine, some five miles distant from the Yard by road, which had been transferred to naval jurisdiction.

Fort Foster consists of shore frontage, cleared land and some swamp. On it is a pistol range for training the Yard's security personnel with incidental storage facilities and abandoned gun emplacements. Except along its shore frontage, the Fort is enclosed by an eight-foot fence with barbed wire strung along the top. Gates at the two points of access to the Fort by road are kept locked, but it appears that entrance to the Fort can be gained either by crawling under the fence at various places or walking around it at low tide. Signs on the gates and at points along the fence give notice that the Fort is government property and forbid trespassing. Civilian security guards under the command of Captain Ferriter, who had keys to the Fort, patrolled it by automobile every two hours. Although not formally designated as a recreation area, it had been used for years by personnel stationed at the Portsmouth Naval Shipyard, and their families and guests, for camping, picnicking and bathing.

On the morning of April 28 Mrs. McAfee drove her son and the minor plaintiff to the City of Portsmouth where they purchased supplies for the proposed camping trip and picked up the minor plaintiff's camping equipment and 22 caliber rifle at his home. They also picked up the camping equipment and 22 caliber rifle of the other Portsmouth boy at his home and then returned to the Yard where all the camping equipment including the guns was piled in plain view in the McAfee's back yard. The older Ferriter boy arranged for transportation to the Fort in a security patrol car on one of its regular trips and shortly after lunch the car arrived driven by a security guard and containing the Ferriter boys and their guest and their equipment, including three guns from the Ferriter house. The rest of the equipment was loaded into the vehicle and the boys were driven to the main gate of the Yard where the Marine guard on duty checked the boys' passes in the usual manner but asked no questions about the guns which he must have seen for they were in plain sight. The boys were then driven to Fort Foster where the security guard unlocked the gate and drove the boys to the site chosen for their camp where they unloaded their guns and equipment.

The boys set up camp for the night and then the older Ferriter boy handed out approximately 100 rounds of ammunition to each boy except Robert McAfee who brought his own. The boys spent the afternoon in pairs, hunting and shooting at any target that appealed to them. On one occasion during the evening the regular two-hour security patrol of the Fort "checked in" on the boys and found all well.

The boys rose early the next morning and continued their hunting and shooting. About half past ten they packed their equipment beside the road for their return to the base in the patrol car on its next trip. While waiting for it the minor plaintiff and the other Portsmouth boy began to wrestle on top of a small knoll near by. The McAfee boy joined them for a while and then

seeing a loaded *22* caliber rifle lying on the ground decided to do some more shooting. At a point about fifty feet from the hill where the boys were still wrestling he threw a wad of paper into the air, took aim and fired. At that moment the minor plaintiff stood up directly in the line of fire and the bullet hit him in the back inflicting the injuries for which he here seeks to recover.

The evidence is clear and the District Court found that the McAfee and Ferriter boys had frequently gone to Fort Foster before with their rifles, that the security guards were under standing orders to take the boys to the Fort on their routine patrols whenever the boys wanted to go, and that the boys on previous occasions had not only been careless but actually reckless in the use of their weapons at the Fort. There is also evidence and it was found that the parents of these boys knew that their sons took firearms to the Fort but there is no evidence that they knew that their boys used their weapons carelessly or recklessly. There is no evidence that either Captain McAfee or Captain Ferriter personally knew specifically that the boys were taking their guns on the particular trip involved. Nor is there any evidence that the senior plaintiff knew anything about the use of firearms by anyone at the Fort, either on the occasion of the near fatal camping trip or before, or that the minor plaintiff either knew or from past experience should have known that the McAfee and Ferriter boys had been careless or reckless in their use of rifles at the Fort or elsewhere, for it was his first trip to the Fort with the boys.

The parties stipulated that at the time of the accident the minor plaintiff was at Fort Foster at the personal invitation and as a guest of the Ferriter and McAfee families. And the court below found that the boys were there with the full knowledge and acquiescence of responsible officials of the Yard from which it further found that they were at the Fort "with the implied and perhaps express consent of the Government." The court concluded from this "that the minor plaintiff's injuries were direct

attributable to the negligent failure of responsible government employees in their official capacities [Captain Ferriter as we have pointed out was in charge of security at the Yard and at its appendage the Fort] to supervise or stop the dangerous practice which has been described [*i.e.* the negligent and reckless use of firearms at the Fort by the boys], and that defendant is responsible therefor." Wherefore it entered the judgment for the plaintiffs from which this appeal has been taken.

Under the Federal Tort Claims Act, Title 28 U.S.C.A. § 1346 (b), the United States is liable to the plaintiffs if a private person would be liable under the law of the place where the act or omission occurred. The alleged act or omission occurred in Maine and the parties agree that Maine law applies even though the accident happened on Government property.

Turning to the law of Maine it is clear from a long line of cases, some of which will be mentioned presently, that there can be no actionable negligence unless there is a breach of some duty, and that the duty of a landowner to persons on his land varies according to the latter's status. *Lewis* vs. *Mains*, 150 Me. 75 (1954), and cases cited. If one on another's land is an invitee, the landowner owes him the duty of using reasonable care for his safety. On the other hand, if he is merely a licensee or a trespasser, the landowner owes him no duty except not wantonly to injure him or to set traps for him. *Nelson* vs. *Burnham & Morrill Co.*, 114 Me. 213, 216 (1915). See also *Lewis* vs. *Mains*, *supra*, 76, 77.

What, then, was the status of the minor plaintiff at Fort Foster? He was clearly not an express invitee of the United States Government. But he was at the Fort with the knowledge and acquiescence of responsible government officials. Of that there can be no doubt. And we may assume, although we do not need to decide, that their knowledge and acquiescence was that of the United States. But under the law of Maine a landowner's knowledge

that another is on his land, or even the landowner's consent to another's presence on his property does not make the one on the land the implied invitee of the landowner. He does not invite persons to go on his land merely for their own convenience or to satisfy their curiosity. *Stanwood* vs. *Clancy*, 106 Me. 72, 76 (1909), cited with approval in *Lewis* vs. *Maus*, *supra*, 77, where it is said that "it is recognized that no implied invitation will arise without some mutuality of interest as between the visitor and the owner."

Perhaps a tenuous mutuality of interest might be found with respect to the minor plaintiff's visit to Captain McAfee's quarters in the Navy Yard. It may be, although we do not decide, that the Government derives some indirect advantage in the way of improved morale of its officials by allowing them to have civilian visitors in their quarters on government installations. But Fort Foster, although often used as a recreation area by naval families stationed at the Shipyard and their guests, was not designed or maintained or even designated for that purpose.

The recent case of *Lewis* vs. *Maus*, to which we have frequently referred, is closely in point on its facts and rules the case at bar. In that case the father of the minor plaintiff was employed at the defendant's sawmill, and had been allowed by the defendant to build a house on sawmill premises. On the premises was an extensive sawdust pile crossed by a well defined path near the top of which were electric wires leading to the mill. The minor plaintiff, a little girl, climbed the pile following the path, came in contact with the wires and was seriously injured. The court rejected the attractive nuisance doctrine on the basis of prior authority and ruled that the only invitation given was to the father to build his house and live there with his family and that that invitation to the father did not constitute an invitation to his children to climb the sawdust pile. Nor, said the court, could an invitation to employees' children to climb the pile be implied since it

that respect there was no mutuality of interest between the defendant and the child. The court said at pages 77 and 78 quoting, 38 Am. Jur. 761. "Where one enters a part of premises reserved for the use of the occupant and his employees and to which there was no express or implied invitation to go, there can be no recovery for resulting injury, even though he is an invitee to other parts of the premises." And at page 79 the court added: "Even if the declarations [the cases that of father and daughter, came up on demurrers] alleged enough to imply a permission to play upon the sawdust pile, which we do not think they do, plaintiff would fare no better. As a mere licensee the child would go on the pile at her own risk and be bound to take the premises as she found them."

In the case at bar there is no claim that any defect in the premises at Fort Foster caused the minor plaintiff's injuries. The claim is that responsible officials at the Portsmouth Navy Yard were derelict in their duty either in not preventing the boys from using firearms at the Fort at all, or in not providing adult supervision over their shooting. However, a landowner's duty may well embrace more than the mere physical safety of his premises. We may assume that under the law of Maine one who operates a shooting gallery for profit, or maintains a private game preserve to which hunters are admitted for a fee, is under a duty to supervise the use of firearms on his own premises, particularly the use of such weapons by minors. But it does not follow from this that a landowner who passively permits, or at least does not object to, hunting or shooting on his land is under any duty to supervise the conduct of those who come on his land only for their own sport, be they minors or adults. The reason for this is lack of mutuality of interest. And we do not see that the situation would be any different if out of good nature the landowner perhaps on his way home from town gives a ride to boys or men knowing that they are on their way to his farm or woodlot to shoot for sport.

In the course of his argument, in response to a question from the court, appellees' counsel, correctly recognizing the force of some of the above, stated that the true nature of the Government's liability was not predicated upon ownership of Fort Foster, but would have been the same if Captain Ferriter had sent the boys to another island, not owned by the Government. We construe this to mean that the Government should be held liable for having furnished recreational facilities, Government owned or otherwise, with dangerous accompaniments, that is to say, youngsters with rifles. Passing the question of whether the record discloses sufficient knowledge on the part of Captain Ferriter of the propensity of these boys to use 22 caliber rifles dangerously, or the correctness of a ruling that 15 and 16 year old boys are, *per se* not to be so trusted, Captain Ferriter was not an agent of the Government, in other words, it was beyond the scope of his authority to bind the Government with responsibility therefor to furnish the minor plaintiff with private recreational facilities. The Government cannot be held as a landowner. Neither can it be held as principal for the act of a member of the armed forces engaged purely in entertaining guests of his son.

Judgment will be entered vacating the judgment of the District Court and remanding the case to that Court for the entry of a judgment for the defendant.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5597

UNITED STATES OF AMERICA
Defendant, Appellant.

vs.

DONALD K. SCHULTZ, ETC., ET AL.
Plaintiffs, Appellees

JUDGMENT

October 6, 1960

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was argued by counsel

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows. The judgment of the District Court is vacated and the case is remanded to that court for the entry of a judgment for the defendant

By the Court.
/s/ ROGER A. STINCHFIELD
Clerk

[cc. Messrs. Mills and Zampano.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5597

UNITED STATES OF AMERICA
Defendant, Appellant

vs.

DONALD K. SCHULTZ, ETC., ET AL.
Plaintiffs, Appellees

APPELLANT'S STATEMENT OF POINTS ON APPEAL

Defendant-appellant herewith presents the points upon which it claims the court erred:

1. In holding (pages 11 and 12 of the Opinion) that the status of the minor plaintiff-appellee was that of an invitee to whom the defendant-appellant owed a duty to exercise reasonable care for his safety.

2. In holding that the defendant-appellant owed the plaintiff-appellee a duty of care in protecting him from the dangerous activities of a third person.

3. In not considering or in any way dealing with the issue of proximate cause since the defendant-appellant's liability for negligence, if any, was terminated by an independent, intervening cause. If the issue of proximate cause had been considered the court should have determined that an independent, intervening cause was responsible for the minor plaintiff-appellee's injury and damage.

UNITED STATES OF AMERICA
By PETER MILLS
Attorney for Defendant-Appellant

December 22, 1959

28 U.S.C.A. § 2671

Definitions—As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term—

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.

28 U.S.C.A. § 1346 (b)

"Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

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JAMES R. BROWNING, Clerk

No. 628

In the Supreme Court of the United States

OCTOBER TERM, 1960

DONALD K. SCHULTZ, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

GEO. S. LEONARD,
Acting Assistant Attorney General,

MORTON HOLLANDER,
RONALD A. JACKS,
Attorneys,
Department of Justice,
Washington 25, D. C.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the District Court are reported at 174 F. Supp. 488 and 176 F. Supp. 405. The opinion of the Court of Appeals (Pet. App. 3-10) is reported at 282 F. 2d 628.

JURISDICTION

The judgment of the Court of Appeals was entered on October 6, 1960 (Pet. App. 11). The petition for a writ of certiorari was filed on January 4, 1961.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

A fifteen-year-old boy who had been invited to a naval base as the social guest of families assigned to the base was accidentally shot by another boy while on a private camping and hunting trip on other Government property within the jurisdiction of the base. The question presented is whether the Court of Appeals, on this record, properly interpreted and applied Maine law in holding that the United States was not liable under the Federal Tort Claims Act for this injury.

STATUTE INVOLVED

Section 1346(b) of the Federal Tort Claims Act, 28 U.S.C. 1346(b), provides:

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT

This is a suit under the Federal Tort Claims Act, 28 U.S.C. 1346(b), by Donald Schultz and his father for injuries sustained by Donald on April 29, 1953. On that day, Donald, then aged 15, was accidentally wounded by a camping companion while on a Government naval reservation known as Fort Foster, located in the state of Maine (R. 3b), five miles from the Portsmouth, New Hampshire, Naval Base.

In brief, the record shows that, two days before the accident, Donald had been invited to the Base as a social guest of Robert McAfee, the fifteen-year-old son of a naval officer (R. 57b). He spent the night of April 27, 1953, on the Base in Robert's home (R. 58b). The next morning, they joined two other boys (sons of Captain Ferriter, a ranking naval officer at the Base) and prepared for overnight camping at Fort Foster (often used by naval personnel and their families for recreational purposes) (R. 3b). All four were transported to Fort Foster in a Government patrol vehicle by naval personnel making a routine inspection of the reservation (R. 60b). The boys spent the afternoon hunting and shooting (R. 62b-63b). The following morning, while waiting for the patrol vehicle to take them home, Donald and another boy began wrestling on the top of a small hill near the road. While they were so engaged, Robert,

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"R. — a" refers to the Government's appendix in the Court of Appeals; "R. — b" to the petitioners' appendix in that court. "Pet. App." refers to the appendix to the petition for certiorari.

Donald's host, picked up a gun and aimed at a piece of paper which he had thrown into the air. In the process, he accidentally shot Donald who had just stood up in the line of fire (R. 21a-22a, 3b). Donald was seriously injured.

Suit was filed by Donald and his father against the Government, under the Federal Tort Claims Act, in the District of Maine; petitioners also filed suit in the same court against Robert's father, Captain McAfee. This latter suit was subsequently settled with a $15,000 payment to Donald (R. 13b). The District Court found the United States liable under the Tort Claims Act for failure to supervise or stop the use of firearms by the boys on its property (R. 24a), and on August 25, 1959, awarded $50,097.00 in damages to Donald and his father (R. 13b).

The Court of Appeals reversed. After examining and applying Maine law, it held that Donald was at most a mere licensee at the time of the injury. Consequently the Government, as a landowner, had no duty to supervise the conduct of the boys who had come onto the Fort for their own private recreational purposes (Pet. App. 9). The court noted that, irrespective of Donald's status at the Base itself, he had not been expressly invited to the Fort by the United States Government; although the Fort had been used as a recreational area it was never designed, maintained or designated for recreational purposes. The court also ruled that under Maine law the facts here did not give rise to any implied invitation on the part of the Government to Donald to visit the Fort, and

held that the United States was not liable as a landowner for the injury.

The court then discussed petitioners' remaining contention that the Government was liable for Captain Ferriter's[2] alleged negligence in allowing his two sons, Robert McAfee, and Donald to go on the camping and hunting trip alone. Without passing on the question of whether Captain Ferriter had actual or constructive knowledge of the allegedly dangerous use of firearms by some of the boys on prior trips, the court noted that he had no authority to bind the Government with responsibility for furnishing the boys with private recreational facilities. The United States could not be held liable for Captain Ferriter's alleged negligence while he was "engaged purely in entertaining guests of his son." (Pet. App. 10).

ARGUMENT

The issue of the Government's liability in this Tort Claims Act suit turns mainly upon the application of state law to the particular facts of the case. The Court of Appeals properly read and applied Maine law in holding that the minor petitioner was a licensee and hence that the Government did not owe him any duty to supervise the recreational activities which gave rise to his unfortunate injury. This holding involves no more than a construction of local law in the light of this record, and presents neither an issue of

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[2] Captain Ferriter was the officer in charge of security at the Base. His two sons had accompanied Donald and Robert on the camping and hunting trip.

great significance nor any conflict with another court. There is no occasion for further review.

1. Under the law of Maine, as is generally true in most jurisdictions, the status of an invitee is conferred only upon those visitors who are on the land by virtue of either an express or implied invitation by the landowner. *Lewis* v. *Mains*, 150 Me. 75, 77, 104 A.2d 432, 433; *Foley* v. *Farnham Co.*, 135 Me. 29, 34; 188 Atl. 708, 712; *Kidder* v. *Sadler*, 117 Me. 194, 196-197, 103 Atl. 159, 160-161. An express invitation must be given by the landowner or one of his agents on his behalf. An implied invitation, on the other hand, arises under Maine law only where there is a "business purpose" for the visit (*Robitaille* v. *Maine Central R.R. Co.*, 147 Me. 269, 271, 86 A.2d 386, 387; *Kidder* v. *Sadler*, *supra*; *Nelson* v. *Burnham & Morrill Co.*, 114 Me. 213, 95 Atl. 1029) or a "mutuality of interests" between the landowner and the visitor. *Foley* v. *Farnham Co.*, *supra*; *Kidder* v. *Sadler*, *supra*. In the absence of such an invitation the visitor is at most a licensee to whom the landowner does not owe any ordinary duty of due care; his obligation is simply not to injure the visitor wantonly or to set traps for him.

Petitioners assert that the court of appeals improperly applied these tests in determining that the minor petitioner was a licensee at the time of his injury. They argue that there was evidence of an express invitation, and, alternatively, that there was a sufficient "mutuality of interest" to support the finding of an implied invitation. The short answer to their first contention is that, although there was evi-

dence of an express social invitation extended by the families of naval officers,[1] there was no evidence of any official invitation on behalf of the United States by a Government employee acting within his official capacity. As for the implication of an invitation, petitioners claim that there was a sufficient "mutuality of interest" because Donald's visit served to uphold the morale of the Navy families, and thus benefitted the Government to some extent. But, as the Court of Appeals noted, this argument is no more than tenuous with respect to Donald's visit to the Base itself, and wholly devoid of merit with respect to his trip to the Fort which was never designed, maintained or even designated by the Government for recreational purposes (Pet. App. 8). In its recent decision in *Lewis* v. *Mains*, 150 Me. 75, 104 A.2d 432, the Maine Supreme Court held that there was not adequate "mutuality of interest" between a landowner and the child of his tenant farmer to sustain the finding of an implied invitation for the child to use a different part of the premises not included within the original express or implied invitation to the tenant. 150 Me. at 77, 104 A.2d at 433. This holding is squarely applicable to Donald's use of the Fort facilities as distinguished from Captain McAfee's quarters at the Base. As the Court of Appeals observed, the *Lewis* case is so "closely in point on its facts" that it "rules the case at bar" (Pet. App. 8).

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[1] Petitioners stipulated that Donald was on Government property at the personal invitation, and as a guest, "of the Ferriter and McAfee families" (R. 3b).

But even in the absence of this controlling and recent Maine decision, it would be assumed that the court of appeals correctly applied Maine law since it is constantly called upon to decide issues under the law of that state. See *Propper* v. *Clark*, 337 U.S. 472, 486-487; *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701, 707-708.

2. The conflict petitioners assert between the decision below and *Stewart* v. *United States*, 186 F.2d 627 (C.A. 7), does not exist. In the first place, *Stewart* was concerned with an entirely different area of tort law; it turned largely on the extent to which the United States, in storing hand grenades at an army installation, was obligated to conform to a local statute and local rules governing private owners of explosives. Second, *Stewart* applied the law of Illinois to circumstances differing considerably from those present here.

Nor is the district court's decision in *Beasley* v. *United States*, 81 F. Supp. 518 (E.D.S.C.), in conflict with the instant case. There, liability was imposed, under the law of another state, because the Government had actual knowledge that the minor plaintiff (aged 10) was in the process of carting off some

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There is an additional ground precluding imposition of liability on the United States under the facts of this case. While the courts below did not pass on the contention, under Maine law any potential liability of the United States was terminated by the intervening dangerous conduct of Robert McAfee. See, *e.g.*, *Curtis* v. *Jacobson*, 142 Me. 351, 54 A.2d 520; *Hawkins* v. *Theater Co.*, 132 Me. 1, 161 Atl. 628; *Currier* v. *McKee*, 99 Me. 364, 59 Atl. 112; Prosser, *Torts* § 49 (1955 ed.).

abandoned artillery shells for the purpose of dismantling them, and that other boys had been playing dangerously in the area. 81 F. Supp. at 523-524. In the present case, however, there was no evidence of actual or constructive knowledge on the part of Government officials of the reckless use of firearms. The testimony describing some of the boys' practices which petitioners quote on pp. 21-22 of their petition is relevant to the issue of whether such conduct may or may not have occurred, but petitioners were unable to show that any Government official ever had actual knowledge of it. See the opinion below, Pet. App. 6. Nor could petitioners successfully establish that the use of firearms by teenagers was reckless *per se*, thus creating constructive knowledge giving rise to a duty of supervision.

3. Petitioners also argue that the court of appeals improperly held that, putting aside the Government's obligations as landowner, it could not be bound by Captain Ferriter's arrangements for the recreational activities of his son and guests; on this phase of the case a conflict is suggested between the decision below and this Court's ruling in *Hatahley* v. *United States*, 351 U.S. 173. However, in *Hatahley* the Government was held liable under the Tort Claims Act for certain willful torts committed without proper authority by federal employees in seeking to enforce a federal statute (the Taylor Grazing Act). This holding that those officials were acting within the scope of their employment although their conduct was beyond their actual legal authority is irrelevant

to the instant case. Here, there is no claim of a deliberate or malicious tort on the part of a federal employee; and there is no suggestion that the challenged activity occurred in the course of enforcing federal law. All that is involved, as the court below noted, is whether the United States can be held liable under the Tort Claims Act for the conduct of a naval officer "engaged purely in entertaining guests of his son" (Pet. App. 10). Fundamental principles of *respondeat superior* require this question to be answered in the negative.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

ARCHIBALD COX,
Solicitor General.

GEO. S. LEONARD,
Acting Assistant Attorney General.

MORTON HOLLANDER,
RONALD A. JACKS,
Attorneys.

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